



REPUBLIC OF KENYA



**KENYA LAW**

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**In re Estate of Juma Bin Ali (Deceased) (Succession Cause  
139 of 2009) [2022] KEHC 3319 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3319 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 139 OF 2009**

**JN ONYIEGO, J**

**MAY 27, 2022**

**IN THE MATTER OF THE ESTATE OF JUMA BIN ALI (DECEASED)**

**BETWEEN**

**AMOUR ABDALLA ALI ..... APPLICANT**

**AND**

**JUMA ALI MOHAMED ..... 1<sup>ST</sup> RESPONDENT**

**MWANAHAMISI MOHAMED JUMA ..... 2<sup>ND</sup> RESPONDENT**

**AMINA MOHAMED JUMA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The deceased herein Juma Bin Ali died on 20<sup>th</sup> June, 1970. The respondents herein petitioned for a grant of letters of administration *vide* petition filed on 27<sup>th</sup> April, 2009.
2. The grant was made on 25<sup>th</sup> May, 2010 and issued on 2<sup>nd</sup> June, 2010 to the respondents. The same was confirmed on 29<sup>th</sup> March, 2012 and a certificate of confirmation issued on 10<sup>th</sup> May, 2012.
3. On 25<sup>th</sup> March, 2010 the respondents herein filed Kadhis Court Succession Cause Number 83 of 2010 Mwanahamisi Mohamed Juma, Juma Ali Mohamed, Amina Mohamed Juma v Aly Zaid Mohamed. The Kadhi delivered his judgement on 23<sup>rd</sup> January, 2014 declaring the following persons as the heirs of the estate of Juma Bin Ali (Deceased);
  - (a) Mohamed Juma Ali-Son(deceased)
  - (b) Kibwana Juma Ali-Son(deceased)
  - (c) Rashid Juma Ali-Son(deceased)
  - (d) Mwanamkuu Juma Ali-Daughter(deceased)



- (e) Fatuma Juma Ali-Daughter(deceased)
- (f) Mwinyi Juma Ali-Son(deceased)
4. The Kadhi noted that the above heirs were all deceased and listed their children as the legal heirs. He distributed the estate as per the Quran as follows; each daughter -1/10 and each son 2/10. He also granted letters of administration to the respondents herein as trustees on their own behalf and that of their co-heirs. The kadhi also vacated the orders of the court vesting Plot No.143/111/M.N to Aly Zaid Mohamed and vested the same to the legal heirs of Juma Bin Ali and ordered the same be registered in the names of the trustees on their own behalf and that of their co-heirs.
5. Prior to the institution of succession proceedings before the high court and Kadhi's court there was a dispute case over ownership of L.R 143/MN/Section III comprising the estate in which the said land was awarded to Kibibi Mbwana and Badala Mbwana against the respondents herein. The tribunal's decision was eventually adopted as an order of the court by the court in Kilifi Senior Resident Magistrate Land Dispute Case No.28 of 2001, Kibibi Mbwana,Badala Mbwana -v-Mwanahamisi Juma, Amina Muhamadi Juma, Ali Muhamadi Juma. In its ruling of 6/3/2007 while dealing with an application seeking court to order signing of transfer documents in respect of Plot No.143/MN/Section 3 in favour of Kibibi Mbwana, the court held as follows;
- “This matter was heard by the land dispute tribunal and judgement delivered on 11/9/2001.The said judgement was adopted by the court on 7/2/2002. The respondent did not appeal. The applicant stated that the respondents have refused to sign transfers. I find from the evidence and documents produced that judgement was given in favour of applicant on 7/2/2002. It is the duty of the court to ensure the plaintiffs enjoy the fruits of judgement. Since the application is not opposed, the same is allowed as prayed. The executive officer of this court is directed to sign the relevant transfer forms.”
6. Similarly, on 17<sup>th</sup> June, 2008, the court in Kilifi issued the following orders;
- “ that vesting order be and is hereby issued by this honourable court in respect of piece of land known as Plot No.143 No.143/MN Section 3.
- That this honourable court to sign the transfer documents to facilitate transfer of land to the applicant.
- That signing of the transfer documents by the defendants is hereby dispensed with; and the said Plot No.143/MN be registered in the name of Kibibi Mbwana.
- Costs of this application provided for.”
7. Subsequently, the Transfer was done in favour of Kibibi Mbwana as per the court's orders above on 2<sup>nd</sup> October, 2007.
8. Aggrieved by the above orders, the respondents moved the court again in Kilifi Senior Principle Magistrates Court *vide* ELC Case No. E9 of 2020 Juma Ali Mohamed, Mwanahamisi Mohamed Juma, Amina Mohamed Juma -v- Amour Abdilahi Amour over the same subject matter. The court pronounced itself held that;
- “ on the basis of the material on record, I hold and find the suit property belonged to Juma Bin Ali (now deceased) and was properly registered in the names of the plaintiffs *vide* court order issued on May 10, 2012 by the High Court, and January 31, 2014 by the Kadhi's Court .



I have seen a transfer dated 2<sup>nd</sup> October, 2007 where the property was transferred from Juma Bin Ali to Kabibi Mbwana, allegedly vide a court order dated 13<sup>th</sup> March, 2007. That should be the vesting order that was later stayed by the court on 27<sup>th</sup> July, 2008.

As I said, it is defendant who seeks to rely on that order and he has not told the court the outcome of the application that had stayed the order.

The said transfer is therefore in doubt.

Further, Juma Bin Ali died on the 20<sup>th</sup> June, 1970 as per the letters of administration.

Any such transfer can only be enforced against the administrator. There were no administrators to his estate as at 2<sup>nd</sup> October, 2007, as they only appointed on the 2<sup>nd</sup> June, 2010. The said transfer was therefore a legal nullity.”

9. The court in ELC Case No. E9 Of 2020 in its decree of 23<sup>rd</sup> November, 2021 declared the respondents herein the rightful owners of Plot No.143/111/MN and gave an order of eviction and vacant possession against the defendant and all other persons in illegal occupation courtesy of the defendant.
10. The applicant herein aggrieved by the judgement of the court in ELC Case No.E9 of 2021 Kilifi Court filed an appeal in the Environment and Land Court at Malindi Civil Appeal No.14 of 2021.
11. Further the applicant herein moved this court vide summons for revocation or annulment of grant seeking the following orders;
  - (a) Spent
  - (b) That this honourable court be pleased to order a stay of proceedings in all matters instituted by Mwanahamisi Mohamed Juma, Ali Mohamed Juma and Amina Mohamed Juma the administrators of the estate of the above-named Juma Bin Ali (Deceased) pending the hearing and determination of this application which suits include:-
    - i. Mombasa Kadhi’s Court Succession Cause Number 83 of 2010- Mwanahamisi Mohamed Juma, Ali Mohamed Juma and Amina Mohamed Juma-v- Aly Zaid Mohamed.
    - ii. Kilifi Senior Principal Magistrate’s Court ELC Case Number E9 of 2020 Mwanahamisi Mohamed Juma, Ali Mohamed Juma and Amina Mohamed Juma –v –Amour Abdillahi Amour.
    - iii. Kilifi Senior Principal Magistrate’s Court ELC Case Number E8 of 2020 Mwanahamisi Mohamed Juma ,Ali Mohamed Juma and Amina Mohamed Juma -v- Mzee Mohamed Makoma
  - (c) That an inhibition order be issued against any dealings and/or dispositions with the parcel of land known as Plot Number 143 Section 111 Mainland North pending hearing and determination of this application.
  - (d) That the grant of letters of administration issued to Mwanahamisi Mohamed Juma, Ali Mohamed Juma and Amina Mohamed Juma and confirmed on 29<sup>th</sup> March, 2012 be revoked on the ground that the grant was obtained fraudulently by the making of a case and the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.



12. The application is premised on the grounds therein and supporting affidavit of the applicant sworn on 6<sup>th</sup> December, 2021.
13. The applicant stated that he was a grandson to the late Kibibi Mbwana who was the legal and beneficial proprietor of Plot Number 143 Section 111 Mainland North Located in Barani Mtwapa Within Kilifi county (hereinafter “the said property”). That the late Kibibi Mbwana obtained proprietorship of the subject property after an elaborate land adjudication process conducted by the Kilifi Land Disputes Tribunal which culminated in a judgement delivered on 11<sup>th</sup> September, 2001.
14. The applicant averred that the late Kibibi Mbwana filed Resident Magistrate’s Land Dispute Case Number 28 of 2001 which was allowed on 7<sup>th</sup> February, 2002 and annexed a copy of the court’s ruling of 6<sup>th</sup> March, 2007 as annexure “AAA-1”. That the court issued a vesting order in respect of the subject property and execution of transfer of the same in favour of the late Kibibi Mbwana. That the said transfer was executed on 2<sup>nd</sup> October, 2007.
15. The applicant further stated that Juma Bin Ali (Deceased) was not the proprietor of the suit property thus the same ought to be expunged from the inventory of assets of the deceased’s estate. That the respondents participated in the adjudication process and Kilifi resident magistrates’ land dispute case number 28 of 2001 thus they were all aware of the findings in respect to the suit property in favour of the late Kibibi Mbwana.
16. The applicant stated that the respondents failed to disclose and concealed from this court the fact that the land had been vested on the late Kibibi Mbwana and misled the court that the said property was part of the estate of Juma Bin Ali (Deceased). That various beneficiaries of the late Kibibi Mbwana were the ones in occupation/possession of land.
17. The applicant filed further affidavit sworn on 10<sup>th</sup> February, 2022 and reiterated his position that he was a grandson to the late Kibibi Mbwana who died on 1<sup>st</sup> December, 2012 and not a relative nor a beneficiary of the estate of Juma Bin Ali. That his interest in the suit property was through the late Kibibi Mbwana who was the lawful owner of the subject property.
18. He stated that the respondents were abusing the court process by filing numerous cases in Kilifi Court against him and his relatives in respect to the subject property with no disclosure of the existence and outcome of the land adjudication process.
19. The applicant further reiterated that the respondents fraudulently misrepresented and concealed facts from this honourable in respect to the ownership of the suit property.
20. In response, the respondents filed a replying affidavit through the 1<sup>st</sup> respondent. The respondent stated that the suit property belonged to his late father who was the registered owner. That they had sued the applicant at the Kilifi court matter which was determined in their favour.
21. He averred that a matter in respect to the subject property was still pending in the Environment Land Court thus this court might not have jurisdiction to deal with the same.
22. The respondent further stated that the applicant was not a beneficiary of the deceased’s estate. That the applicant had no right over the suit property.
23. By consent of both parties, the matter was canvassed by way of written submissions.
24. The applicant through his advocates Idris Ahmed & Company Advocates filed written submissions dated 11<sup>th</sup> February 2022. Counsel relied on Section 76 of The *Law of Succession Act* and submitted



that the respondents intentionally and maliciously concealed from this honourable court the fact that the subject property had been adjudicated and determined to belong to the late Kibibi Mbwana.

25. Counsel further relied on the case of in re estate of *Julius Ndubi Javan (Deceased)* [2018] eKLR to advance the proposition that the respondents did not act in *uberimae fidei* as they made an attempt to conceal facts from court which they knew would have an impact in their petition.
26. Counsel reiterated the applicant's argument that the respondents were in abuse of the court of process through their actions of filing several matters in Kilifi court to assert ownership and possession of the subject property. That despite the respondents' participation in the proceedings at the land disputes tribunal and land court in Kilifi they continue to act as if the award by the tribunal, judgement and vesting orders issued by the Kilifi Land Court do not exist and have concealed the same from the courts so as to obtain favourable orders which amounts to abuse of court process.
27. The respondents through their advocates Stephen Oddiaga & Co. Advocates filed written submissions dated 22<sup>nd</sup> February, 2022. Counsel submitted that the respondents were relying on their replying affidavit.
28. Counsel relied on Section 76 of the *Law of Succession Act* and submitted that the applicant was not a beneficiary. That by the time the respondents were being sued, they did not have the letters of administration thus they did not have legal powers and the suit could not proceed against persons with no capacity to be sued in law. That the suit against the respondents was a nullity as it purported to deal with property of deceased person with no legal representation thus cannot be subject to revocation.
29. Counsel further submitted that the applicant did not have locus standi as he did not demonstrate his authority to represent the late Kibibi Mbwana. That the grant could not be revoked as the applicant was a dependant under Section 26 of *Law Succession Act*. That the applicant's claim could only be canvassed in a new suit filed before a proper court or await the outcome of the appeal before Malindi High Court.
30. Counsel further submitted that the issues raised by the applicant were Res judicata and should have been raised before Kilifi Land Court.

#### **Determination.**

31. Having considered the summons, the responses therein and rival submissions by both parties. Issues that emerge for determination are:
  - (a) Whether this court has jurisdiction to hear this matter
  - (b) Whether the applicant has locus standi in this matter.
  - (c) Whether the grant should be revoked
32. On whether this court has jurisdiction, Section 47 of the *Law of Succession Act* provides;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”



33. Faced with the issue of jurisdiction, the court of appeal in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR stated that;

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself... In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989):

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

34. The respondents in this case raised the issue of jurisdiction in paragraph 8 of the replying affidavit of Juma Ali Mohamed filed on 20<sup>th</sup> January, 2022. Their argument being that the issues over ownership of the suit property were still pending before the environment and land court. That the issues had been heard and determined by a competent court.

35. My understanding of the orders sought in the summons herein are orders that emanate from a grant of letters of administration issued by this honourable court. It’s my finding that the said orders fall under the scope of the *Law of Succession Act* and thus this honourable court has jurisdiction to hear this matter in so far as revocation of the grant is concern. In that regard am guided by the holding in the case of *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others* where the court of appeal stated;

“Jurisdiction is specified either by the Constitution or Statute. In Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 Others- Supreme Court Civil Appeal (Application) No. 2 of 2011, the Supreme Court delivered itself as follows on the issue of jurisdiction: -

“A court’s jurisdiction flows from either *the Constitution* or legislation or both.”

36. On whether the applicant has locus standi Nyakundi, J in defining *locus standi* in the case of *Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR stated as follows;

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.”

37. The respondents herein raised the issue of the applicant’s *locus standi* in their submissions. As indicated in the case law above it’s evident that *locus standi* is a preliminary issue that ought to be dealt with at the preliminary stage. No explanation has been given as to why the respondents had to wait for the submissions stage to raise the same. However, the issue of whether the applicant a grand son to Kibibi



Mbwana has locus to bring the instant application, is curable under Section 76 of the *Law of Succession Act* which allows any interested party to make an application for revocation of a grant before court.

38. In this case, the applicant is not a beneficiary of the estate of Juma Bin Ali (Deceased) but an interested party of the estate of the deceased Juma Bin Ali a fact that has not been disputed. In that regard, I am guided by the case of *In re Estate of Hellen Wangari Wathiai (Deceased)* [2021] eKLR where the court state;

“The position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* [1986-1989] EALR468, the Court rendered itself thus:

“... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

However, Section 76 of the *Law of Succession Act* provides:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion...”

What this section means is that applications for revocation of grant is not limited to only beneficiaries but to any interested party.”

39. In view of the provision under Section 76 of the *law of Succession Act*, the applicant is an interested party hence has locus.
40. Regarding the question whether this grant should be revoked, the applicant must establish the elements stipulated under Section 76 of the *Law of Succession Act* which provides;

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
  - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court ordered or allowed; or
  - (ii) to proceed diligently with the administration of the estate; or
  - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced



any such inventory or account which is false in any material particular; or

- (e) that the grant has become useless and inoperative through subsequent circumstances.

41. The applicant's argument is that the respondents failed to disclose and concealed from this court the fact that the land had been vested on the late Kibibi Mbwana and misled the court that the said property was part of the estate of Juma Bin Ali (Deceased). That various beneficiaries of the late Kibibi Mbwana were the ones in occupation/possession of land despite the fact that the respondents were harassing them.
42. In this case, the suit property was transferred to the late Kibibi Mbwana through a court order of 6<sup>th</sup> March 2007 and 17<sup>th</sup> June, 2008 which have never been appealed against. The subject grant was obtained on 25<sup>th</sup> May, 2010 through a petition filed on 27<sup>th</sup> April, 2009 which was 2 years after. Before the issuance of the said grant the respondents moved to the Kadhi's Court and as a result the kadhi issued a judgement on 23<sup>rd</sup> January, 2014 distributing the estate of Juma Bin Ali. The only asset that was distributed by the kadhi court Plot No.143 /III/M.N.
43. The High Court confirmed the grant on 29<sup>th</sup> march 2012 and distributed the estate of Juma Bin Ali (Deceased). The assets indicated in the certificate of confirmation were Plot No.143 section 111 mainland and Plot No.130 section III mainland.
44. I must note that the list of persons surviving the deceased Juma Bin Ali as listed in the affidavit in support of the petition are different from the ones listed by the kadhi.
45. It's a sad state of affairs in this matter as one will note that the respondents have been moving from one court to another without being noticed by the courts resulting to several conflicting decisions over the same subject matter as indicated from the summary of the facts set out herein above.
46. It's evident from the record that the respondents did not disclose the dispute over the subject property in their application for grant in the high court and went ahead to include the subject property in the inventory of assets of the estate. The ownership of the suit property has since become a subject of litigation before various Courts.
47. Accordingly, it's my finding that the respondents concealed material facts from this honourable court and therefore obtained the grant of letters of administration on 25<sup>th</sup> May, 2010. That the respondents made untrue allegations by indicating the suit property as part of the assets of the deceased in the petition despite there being a court orders before the land disputes tribunal awarding the land to Kibibi Mbwana and later adopted before the kilifi court where the court directed the Executive officer to sign transfer documents in favour of the decree holders who were Kibibi and Badala hence ownership changed hands. In the circumstances of this case however, the prudent option is not to revoke the grant. This is because the applicant is not seeking to be an administrator nor is he challenging the appointment of the current administrators.
48. To revoke the grant will leave the estate exposed and without a legal representative to sue or be sued on behalf of the estate. The most viable thing is to stay any execution orders of the confirmed grant both before the high court and the kadhi's court to await a final determination of the ownership dispute now pending hearing of an appeal in respect of the disputed property. It is the final determination over ownership of the disputed property that the court will be moved appropriately to amend or review its orders in form of a confirmed grant.



49. On issues to do with ownership of a property that is claimed to be part of the assets of the estate, the court in the case of In *re Estate of Julius Ndubi Javan (Deceased)* (supra) stated that;

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation...”

50. On matters ownership of land/property, the court with competent jurisdiction is the Environment and Land Court. As indicated earlier, there is an appeal pending the the Environment and Land Court Malindi over the same land. It would be prudent enough for parties to await the outcome of the same.

51. The upshot of the above is that the application is allowed only to the extent that;

- a) The grant of letters of administration issued on 2nd June, 2010 is retained.
- b) Implementation of the certificate of confirmation of grant issued on 29th March, 2012 is hereby stayed pending the outcome of the land ownership dispute now pending determination of the appeal in respect of LR 143 Section III MN.
- c) An inhibition shall be registered on plot number 143 Section III mainland north kilifi restraining any dealings in respect of the said land until the pending appeal is heard and determined.
- d) Costs of this application to be paid by the respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF MAY 2022**

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**J.N.ONYIEGO**

**JUDGE**

